173(m)(2) of our Criminal Procedure Code (F.M.S. Cap. 6) yet I would with respect prefer to follow and adopt the reasoning of Lord Reid in that case that one cannot infer any intention of the legislature to alter as regards summary jurisdiction the old rule that a plea can be changed at any time before final disposal of the case. In the words of Lord Reid it "cannot be right because everyday accused persons who begin by pleading not guilty change their plea to guilty after the plea of not guilty has been recorded and the trial has begun, and that raises no technical difficulty". It follows that if a court upon all the facts before it thinks it is proper to accept a plea of guilty then the court may permit that plea to be withdrawn and a plea of not guilty accepted at a later stage up to sentence, that is, until final adjudication. I therefore considered that the said President was not *functus officio* in this case until she has passed a sentence or has otherwise finally adjudicated the matter. In the circumstances there was no need for any order of revision, and I directed that the learned president should proceed to try the case.

Order accordingly.

Solicitors : *Augustin-Negrin & Co.*

PUBLIC PROSECUTOR v. TAN SEOW CHUAN

[O. Cr. J. (Peh Swee Chin J.) July 26 & September 1, 1984]

[Seremban – Criminal Trial No. 2 of 1984]

Criminal Law and Procedure – Charge of trafficking in opium – Custody – Possession – Power of disposal – Cautioned statement – Prima facie case – Evidence of accused – Burden on accused – Admissibility of statements – Application to impeach credit of witnesses – Dangerous Drugs Act, 1952, ss. 37(d) & 39B – Criminal Procedure Code (F.M.S. Cap. 6), s. 113.

Dangerous Drugs – Opium – Charge of trafficking – Prima facie case – Burden on accused.

In this case the accused was charged with trafficking in opium. The accused was alleged to have possession of the opium found in a house raided by the police. The learned trial judge held that there was a *prima facie* case against the accused and called on him to enter on his defence. The accused gave evidence that he was not the occupier of the room where the opium was found and he did not have custody of it.

Held, it was a matter of grave doubt as to whether the accused had custody or control of the opium found in the room in the house. In any event he had no power of disposal of the opium and could not be said to have possession of it. The accused should therefore be acquitted.

Cases referred to :

(1) *Haw Tua Tau* v. *Public Prosecutor* [1981] 2 M.L.J. 49.
(2) *Dato Mokhtar bin Hashim* v. *Public Prosecutor* [1983] 2 M.L.J. 232.
(3) *Muthusamy* v. *Public Prosecutor* [1948] M.L.J. 57.
(4) *Meering* v. *Graham-White Aviation Co. Ltd* (1919) 122 L.T. 44.
(5) *Khoon Chye Hin* v. *Public Prosecutor* [1961] M.L.J. 105.
(6) *Toh Ah Loh & Anor* v. *Rex* [1949] M.L.J. 54.
(7) *Leow Nghee Lim* v. *Reg* [1956] M.L.J. 28, 29.
(8) *Chan Pean Leon* v. *Public Prosecutor* [1956] M.L.J. 237, 238.
(9) *Public Prosecutor* v. *Ang Boon Foo* [1981] 1 M.L.J. 40.
(10) *Public Prosecutor* v. *Yuvaraj* [1969] 2 M.L.J. 89.

CRIMINAL TRIAL.

Mohamed Zaki bin Mohamed Yasin (Deputy Public Prosecutor) for the Public Prosecutor.

Mahadevi Ganeshmurugan Seeralan for the accused.

Cur. Adv. Vult.

Peh Swee Chin J. : The accused is charged for an offence under section 39B (1) and punishable under section 39B (2) of the Dangerous Drugs Act, 1952, (the Act) for trafficking in opium.

The prosecution story is that PW 1, an inspector of police attached to the Anti-Narcotics Branch of the Seremban Police, received information on the telephone at 9.15 a.m. on October 14, 1983 of an offence relating to dangerous drugs at Lukut. Such information was then reduced in writing. He then led a party of nine other policemen, to an unnumbered house at Sungei Salak Estate, Siliau, Lukut, apparently in pursuance of the information received. On arrival at the said house, he said he found a Chinese man in the hall or living room of the said house. It is not disputed by anyone, that the man so found was the accused in this case, an old man of 69 years. He identified himself as a police officer to the accused and asked for the latter's name which was given. Then followed a very short conversation between the accused and PW 1 which I had ruled inadmissible on hearing and upholding objections against it. I will set it out also. PW 1 asked the accused where his room was and the accused said it was the first room on the left as one entered the said house. PW 1 told him he wanted to examine the said room. At this juncture, three Chinese women came to join the

accused and PW 1 from the back portion of the house. PW 1 then said he, together with the accused, his wife (DW 2), Det./Cpl. Latif (PW 2), Det./Sgt. Samad, and Det./Cpl. Nilenon entered the said room. The DW 2, *i.e.* the accused's wife, was one of the three Chinese women who joined the accused. The said room was marked as room B in the sketch plan (P 1), drawn by PW 3, an investigation officer. In room B, PW 1 examined the place under the double bed therein and found the following articles: Two "Milo" tins (P 3A and P 3B), both containing a black substance, which according to the chemist, PW 4, was, on analysis, found to be neither opium nor any other dangerous drug. A paper box, (P 4), was found to contain small bundles of small pieces of paper. Two peanut-butter bottles, (P 5A and P 5B), were found, containing some black substance. P 5A and P 5B were found, on analysis, by PW 4, to contain 553 grammes and 593 grammes respectively of prepared opium. PW 1 also found a basin, (P 6), which according to PW 4, was found to contain 1834 grammes of raw opium refuse. He also found a plastic bag or package (P 9), which, on analysis, was found to contain 1903 grammes of raw opium. He also found a wooden box fitted with a padlock, (P 7), containing bundles of cash or currency notes, amounting to $3,305/- in all. He also found a weighing scale, (but without the usual balancing weight), (P 8), which was found by the chemist to have traces of chandu or prepared opium on its pan. There were two other boxes under the bed as shown in the photographs taken on a later date which were found to contain old clothes and were not among the exhibits tendered in Court. He said to the effect that the exhibits aforesaid were recovered in the presence of the accused and his wife (DW 2), that the bed had no bedsheet, and he could not remember seeing any clothes hanging on the wall or how many pillows were there on the bed. He had the exhibits carried to the police van, (by which the PW 1 had come earlier), together with the accused and they were taken to the police station, where a search list, (P 10), was prepared and signed by the accused. PW 1 also lodged a report. Of the total ten members of the raiding party, only four of the members went inside the house, the rest were outside, guarding the front and back of the house. He also found four small children, in addition to the three women mentioned earlier. He also searched the other rooms in the house and area outside the house and recovered nothing else.

In cross-examination, PW 1 said he had served in the police force for 14½ years. He disagreed it was necessary to have the exhibits photographed. He said he only issued the search list three hours later at the police station. He said he was aware of the allegation that the exhibits mentioned earlier, except the cash, were not found in room B and that the wife of the accused, (DW 2), had lodged a report with the police. He disagreed, that except for the cash and the weighing scale (P 8), all the exhibits were found in a shed outside that house as shown in certain photographs shown to him. He said he did not take photographs of the exhibits on finding them, (*i.e.* there and then) because it would take time to do so. He agreed to the effect that he did not ascertain as to whom that house belonged or as to how many persons were residing therein, but disagreed that the accused never followed him everywhere while the search was being conducted but had merely remained seated. He said the exhibits were hidden by those two boxes shown in the photographs (and it is not in dispute that those two boxes were not taken possession of by PW 1). He agreed that apart from what the accused said (*i.e.* the room B was his room and which this Court has ruled inadmissible), there was no other evidence that the accused was using room B. He agreed that the accused could not walk by himself, but he said the accused was assisted in walking about by Det./Cpt. Latiff on one side and the accused's wife (DW 2) on the other. He denied that the accused was first found sitting in the hall but maintained that he was standing then. He forced open the wooden box fitted with a padlock (P 7), in which the cash was found.

In re-examination, he said he would have brought his camera if he were to know of the allegation made against him. He did not bring along a blank form of the search list during the raid because he did not expect to find the exhibits. He denied he had framed up the accused.

PW 1 sent all the exhibits stated above to PW 4, the chemist, on two separate occasions; the first time, all except the weighing scale (P 8), the second time only the weighing scale (P 8) was sent to the same chemist (PW 4).

PW 2 (Det./Cpt. Latif) gave substantially the same evidence as PW 1 except for what follows, but what follows is not exhaustive. He said he was guarding the accused (who was not handcuffed however,) by merely holding the accused's hand. He did not see any picture or clothes hanging on the wall in room B and neither was there any wardrobe or almeirah there. He did not see any blanket, bedsheet or pillow in that room.

In cross-examination, *inter alia,* he said he was directed by PW 1 to guard the accused, but he did not know why he was so directed. He guarded the accused so that the accused could not go anywhere else. If the accused had run away, he would arrest him back. He was already arrested and if the accused wanted to go anywhere else, he would re-arrest him.

Under re-examination, *inter alia,* he said that when he brought the accused, and helped the accused's wife take the accused to room B, the accused was not officially arrested. He said the other two women, apart from the accused's wife, were also in room B.

PW 3, Inspector Bob Arumugam, the investigation officer in this case, received instructions to investigate the case. He had the accused sent to PW 8, one Inspector Tay, for a cautioned statement to be recorded from the accused. PW 3 also drew the sketch plan and key (P 1 and P 1 K). While at that house, he met one Tan Choon Hock (DW 5), the son of the accused who admitted he was the owner of that house. He met the accused's wife, (DW 2), and two daughters-in-law (DW 3 and DW 4 respectively). He instructed photographs to be taken of room B and that unnumbered house, (which was a detached plank building, standing in some open ground without fencing). He obtained the chemist's report, (P 13), and served it later on the accused. He agreed police would commence investigation into a report concerning a seizable case. The report was lodged on October 14, 1983 but he was only informed of it at 8 a.m. on October 15, 1983. He was aware of the report lodged by the wife of the accused about the incriminating items being found outside the house. Looking at the photographs shown to him, he agreed that they showed the chicken coop and the shed and that the compound of the house had no fence. He said he did not find out to whom the shed, the chicken coop and the house belonged. He said the wife of the accused told him she and the accused occupied room B but he did not establish to whom the other four rooms belonged. He did not check whether room B had a lock. He did not have to use a key to open room B. Any member of the accused's family could go in and out of room B. He saw a lot of old clothes in room B, of males and females, but he did not ascertain as to which of the clothes belonged to the accused. The wife of the accused did not tell him exactly where the exhibits mentioned above were recovered, for she simply said they were recovered outside the house.

I pause to make an observation. What the wife of the accused told PW 3 is inadmissible of course, being a statement made by a non-accused person in the course of investigation.

PW 6, (DPC Razali), was among the police party and on arrival at the scene he was instructed to guard the back portion of that house outside that house with DPC Hamzah (identified) for more than half an hour. He did not see anybody recovering anything from outside that house. He maintained he was telling the truth in cross-examination.

PW 7 (DPC Othman) was assigned to guard the front of the house though he did not know what was going on inside the house, he saw PW1 coming out of the house later with the exhibits in question.

PW 8, (Inspector Tay), was the recording officer in regard to the cautioned statement given by the accused. After a trial-within-a-trial, the cautioned statement (P 15) was held to be admissible. I will deal later with the reasons for admitting P 15.

In P 15, the accused stated *inter alia*, that he had stayed in that house and his family consisted of three sons, two daughters-in-law, his wife and four grandchildren. He had been smoking opium since the age of 24. On that day, the police searched his whole house and in his room, below his bed, they found a wooden box with cash of $3,300/- which was not his but for paying the workers of his son. They also found about 15 small packets of prepared opium (chandu masak), of about 1" long which had been bought earlier in Kuala Lumpur for his own use. These 15 packets of raw opium were found by the police on top of the place where he kept his clothes. Police also recovered various articles outside the house. He did not know what articles they were.

I pause once more from the evidence to make another observation. The accused, an old man of 69 years, appeared to have difficulty of getting up and walking about. The Court has earlier asked him to get up from his chair and found it so. Once, hearing of this case could not go on for one day as he was quite ill and was believed to be getting some sort of emergency treatment in hospital. On another day, hearing could not commence at 9.30 a.m. as usual but had to start very much later for the same reason. On yet another day, hearing had to terminate earlier than usual because he appeared to be in difficulty with his breathing and this was brought to my attention and I found it so.

At the end of the prosecution case and counsel's submissions in regard thereto, the accused's defence was called. I found there was evidence for a *prima facie* case, in the manner, judicially explained in the Privy Council case of *Haw Tua Tau* v. *Public Prosecutor*.[1] I had not begun to consider the degree of weight to be given to, or the accuracy of the evidence of any of the witnesses but merely to ascertain, whether there was evidence so long as it was not inherently incredible, (with the Court acting only as a decider of law at this stage), to satisfy the ingredients of the offence with which the accused is charged. The words, "inherently incredible", used by the Privy Council in the *Haw Tua Tau case*, in my experience lately, have given rise to a lot of confusion. I would take them to mean, on a fair reading of that judgment, that on the face of it, such evidence is not fit for believing. There was the cautioned statement of the accused, about the police recovering from under his bed, P 7 (the wooden box with cash) and the evidence of prosecution witnesses about the recovery of the exhibits under the same bed and of the police being led to room B. The decision in *Haw Tua Tau* is one about which a large number of lawyers, both practising lawyers and academicians are perturbed. It is irrelevant as to whether this Court shares their sentiments because of the doctrine of *stare decisis*. The submissions of both counsel, largely directed to the question of weight of the prosecution evidence, would therefore be only considered, with benefit, by the Court at the end of the whole case, as so enjoined by the judgment in the *Haw Tua Tau* case.

As regards the cautioned statement, (P 15), the recording officer, (PW 8), said he was a Hokkien, just like the accused. There is no reason at all to doubt this. When he spoke to the accused, he did so in mixed Hokkien and Mandarin, the latter the accused said he could not speak. Learned counsel for the defence was persistent about the lack of understanding of the accused to the questions when they were asked by PW 8 of the accused. Learned Deputy very correctly pointed out that the Court, in the trial within the trial, should be concerned with the question of voluntariness of the cautioned statement. I found that the statement was voluntarily given, and it was established to me beyond reasonable doubt that there had been no promise, inducement or threat of any kind, given or made to the accused prior to the recording of the cautioned statement. The fact that the accused was taken from the lock-up without his prior consent to PW 8 for recording the statement which the accused did not intend to give, was in my view, besides the point on the voluntariness of the giving of the statement, bearing in mind that the accused could have shut up like a clam if he had wanted to, not forgetting the words or meaning of the caution administered, for learned counsel seemed to have objected to the fact from his line of examination of witnesses.

I now deal with the salient points of the evidence adduced by the defence. The accused said, *inter alia*, that when the police raided that house that morning, he was seated in the hall taking his milk, (the prosecution evidence was that he was standing there). The police asked his wife, (DW 2) and his two daughters-in-law (DW 3 and DW 4) to go with them for searching the rooms. He did not go into the rooms helped by a policeman and his wife as alleged but remained where he was in the hall. He appeared to get very emotional several times and harp on the lies from the police. He said he occupied room D as marked in the sketch plan, (P 1), where he kept all his personal belongings. He was forced to sign the search list, (P 10). None of the exhibits produced in court belonged to him. Room B was occupied by his wife but sometimes the grandchildren stayed with her there. He used to work as an odd-job labourer, and a rubber tapper and that he was not educated and could not read Chinese but he signed his name in Chinese. He did not see the searching when it was being conducted by the police. He had been staying in room D for many years. His wife was staying in room B. He said his eyesight was poor. (The accused was seen in court to be wearing thick lenses). He said in room D, he had many pillows because he had been an asthmatic patient. He had been an opium addict since the Japanese occupation when he had a licence to smoke again. He denied being brought into the rooms during the search. He became very emotional and challenged PW 1 to cut the cockerel's head, (as to the truth of what PW 1 had said).

DW 2's evidence is substantially the same as the accused's evidence. When she was giving evidence, surprisingly, through counsel, she asked for protection for and answer to the question as to who was occupying room B, before answering it. The Court considered the question relevant and explained to her of such protection under section 132 of the Evidence Act. She said she was the occupier of room B at the time of the said raid on the house while her husband was occupying room D. She was weeping about the police framing up the case against her husband. She said except for the wooden box with the cash (P 7), the weighing scale (P8), and a red plastic basin not among the exhibits, all

the other exhibits were not recovered from room B but from outside the house at a place near a durian tree, and they did not belong to the accused or to her.

DW 3, (Lee), a daughter-in-law of the accused of 30 years of age giving similar evidence, said to the effect that the police at the material time, brought her, her mother-in-law and the other daughter-in-law to room B. Her children, sometimes her mother-in-law, stayed in room B, where guests sometimes stayed also. The police found P 7, (wooden box with cash), P 8 (weighing scale) in room B together with a plastic bag which was not among the exhibits. The weighing scale was brought to the house by children for playing and she did not know from where they got it. Room D was occupied by the accused. She described the different positions of both the beds in room B and D respectively. The accused never slept in room B and had been sleeping in room D since she got married. The accused was sitting in the hall and never came to room B while the search was being conducted in room B and other rooms. Her mother-in-law, (DW 2), was in control of the house and all expenses were paid by her mother-in-law but her husband gave money also to the mother-in-law. P 7 was used for keeping money. Except for the items she mentioned, none of the exhibits was found in room B. The learned Deputy then applied to impeach her credit concerning a previous statement of hers stating that opium dross was also found. The statement was proved to have been made though it was recorded in English in narrative form from questions and answers, asked or made in Malay. She was, she said, not proficient in Malay at all. She denied making this statement about the opium dross (P 19) but later explained she might have forgotten what she said as it happened so long ago. Counsel was asked by the Court to make his submissions on this matter of impeachment at the conclusion of the case and Court's decision thereon would likewise be reserved until the conclusion of the case.

DW 4, (Chiam), the other daughter-in-law, 22 years of age, said to the effect, that the accused was not in any rooms while a search was being conducted of them. Room B was occupied by her mother-in-law and sometimes by children and guests and accused never stayed there. Except for three items as mentioned by DW 3, the exhibits were not recovered in room B. P 7 (the wooden box with the cash) was made by her mother-in-law for keeping money. The mother-in-law maintained the family. The accused was not involved in selling chandu. She said her mother-in-law's room was room "I" as shown in the sketch plan (P 1) but the mother-in-law sometimes stayed in room B. The accused stayed in room D. She later said that sometimes, her mother-in-law stayed in room "I". She was a construction labourer and rubber tapper before she got married. She said before coming to court she did discuss the case with her mother-in-law. The learned Deputy applied to impeach her credit in regard to the two previous statements or rather two passages in her previous statement. The first was that she said she did not witness the search of room B and secondly she said her parents-in-law were sharing the same room. She denied making these statements which were proved but she kept saying she understood very little of the Malay which was used by PW 3 (Inspector Bob Arumugam) in questioning her. Decision of the Court on impeachment was also postponed until the conclusion of the case. DW 4 said further in the beginning that she did not witness the search, but later she did. She later said she could not remember whether she had made these two statements. She said the accused was staying in room D.

DW 5, (Tan Choon Hock), son of the accused and husband of DW 3 *inter alia* said the house belonged to him and the accused was not the previous owner of the same house. DW 4's husband was his younger brother aged 24. There was another unmarried brother aged 29 living in the house. He produced a document of title to prove he was the owner of the house.

I will, first of all, deliver my decision as regards the application for impeachment against DW 3 and DW 4. I rule that they are not impeached, in the popular sense, of the Court thus treating their evidence as totally worthless. On DW 3's discrepancy about the opium dross, the charge against the accused relates to prepared opium and raw opium and not opium dross. The accused, being a self-confessed opium addict, could have left behind opium dross after smoking opium. The discrepancy though material, considered also in conjunction with the rest of her evidence and that of other witnessess, has not rendered her evidence totally worthless or her credit impeached. It is not necessary to deal further with her evidence, having said that. About DW 4's evidence in question, the discrepancies are undoubtedly material, but when they are considered together with all other evidence, in the manner as stated in the Federal Court's judgment in *Dato Mokhtar bin Hashim* v. *Public Prosecutor*[2], the Court again is left in considerable doubt as to whether the rest of her evi-

dence other than the evidence impugned giving rise to the said impeachment, is really totally worthless. Her evidence like that of DW 3 may even have only minuscule value but not, I am afraid, totally worthless.

I am aware that the application for impeachment has not been conducted strictly in accordance with the manner recommended in *Muthusamy* v. *Public Prosecutor*[3] nonetheless there has been substantial or sufficient compliance with it. There was in each case, a request to impeach the witnesses in question, the Court read the passages in question and explained to the witnesses who were given a chance to explain the discrepancies which they explained naturally by saying that they could not remember what they had said to the investigation officer after having denied making them earlier. Their evidence has been considered as a whole with the rest of the evidence at the end of the defence. I have earlier held that their credit has been saved though not unscathed.

I will now deal with the reasons for holding as inadmissible the part of the evidence of PW 1 about the accused having told him that room B was his room before the police party *etc.* entered and searched it. It must be remembered that an information leading to the raid on that house was received prior to the raid. The information was reduced into writing. This must be the first information report. When the police party raided the house, investigation had therefore already commenced. Any statement made in the course of such investigation would be inadmissible. However, section 113 of the Criminal Procedure Code makes the statement of the kind, said to have been made by the accused, admissible, if, *inter alia,* it was made after his arrest and no caution was administered to the accused before it was made, or when there was no such caution, it was because there was no time for it, but it was subsequently administered as soon as possible. The accused in my view was under arrest as soon as PW 1 showed his authority card to the accused who told PW 1 his name, on being so asked because the raid was consequent on the report of a seizable offence, *i.e.* drug trafficking and PW 2, (D/Cpt. Latif), who was with PW 1 at the time in the hall, was asked by PW 1 to guard the accused. Although there were no such popular and usual signs of handcuffs or words of arrest, nonetheless there would be no doubt, that his personal liberty was from that moment restrained, therefore he was under arrest from that moment, and such restraint of personal liberty can be implied from surrounding circumstances. In *Meering* v. *Graham-White Aviation Co. Ltd.*[4], an action for false imprisonment, the plaintiff there, suspected of theft, was accompanied by the police to the office on being told by the police that he was wanted to give evidence in connection with theft. Defendant argued that the plaintiff was free to go anywhere he liked in the waiting room. It was held by the Court of Appeal that this plea would fail and the plaintiff was entitled to judgment as from the moment that he came under the influence of the police, the plaintiff was no longer a free man, a man could be imprisoned without actually knowing that he was being imprisoned. The brief facts and the ruling of this case came from *Cracknell's* Law Students' Companion, No. 2 Torts, Third Edition, cited by learned defence counsel. I have also not been able to verify this short excerpt with the full report of the case in *Times Law Report* series which this Court is at the moment without. I can only hope that the excerpt is accurate and precise. There was admittedly no caution. Since the back and front doors were sealed off, so to say, by PW 1's men, there seemed to be plenty of time for administering the caution. Neither was the caution administered as soon as possible thereafter. It was only administered by PW 8 (Inspector Tay) on the following day.

I have only mentioned what I regard as salient points of the evidence but it does not necessarily follow at all, however, that what has not been mentioned has not been considered. I am aware, of course, that discrepancies are bound to occur from witnesses testifying on same matters but the discrepancies, material or otherwise, would have to be borne in mind so that either no weight at all, or little weight or some weight is to be accorded to their evidence. Thomson, C.J., (as he then was) in *Khoon Chye Hin* v. *Public Prosecutor*[5] sitting in the Court of Appeal said, to quote – "If a witness demonstrably tells lies on one or two points, then it is clear that he is not a reliable witness and as a matter of prudence, the rest of his evidence must be scrutinized with care and indeed with suspicion. To say, however, that because a witness has been proved a liar on one or two points then the whole of his evidence must in law be rejected is to go too far and wrong". I have watched the witnesses in the box, taking account of their reactions, hesitation *etc.* I am aware of the strong tendency of the defence witnesses to exculpate the accused because of their relationship with one another and neither has it escaped from my attention, the probability, as the case went on, of PW 1 feeling absolutely convinced of the commission of the offence in

that house and being so convinced, was going all out to pin it all on the accused whether PW 1 was also absolutely convinced in turn of the accused's true role in the whole transaction. PW 1 was of course, the senior officer and leader of the raiding party. I have taken account of the accused's physical condition at all material times. I therefore make the following findings:-

(1) All the exhibits were recovered inside that unnumbered house from room B;

(2) the accused was unable to walk and in poor health at the time of the raid and had remained seated in the hall while the search was being conducted by the police in the presence of at least the accused's wife and DW 3;

(3) no personal belongings of the accused were found in room B and room B did not have a bedsheet or pillow on the double bed, no wardrobe or almeirah with clothes, no clothes, pictures or photographs of the accused hanging on the wall;

(4) the door to room B did not have a lock and neither was it locked when PW 1 and the others entered it;

(5) the accused had been for more than 20 years, an opium addict at the time of the raid and the running of the whole family remained substantially with DW 2, the accused's wife, who appeared to be a very capable and domineering personality in the whole family while the accused, was in poor health and in a very likely state of lethargy and apathy consequent upon prolonged use of opium. The accused's wife had control, care and management of all family matters;

(6) there were 7 adults and 4 children residing in that house at that time of raid, *viz.* the accused, his wife, his two married sons and two daughters-in-law and the unmarried son, and 4 grandchildren of the accused and that one of the adults was away from home at the time of the raid and had been so away for a few months, *i.e.* DW 5;

(7) the daughters-in-law were not proficient in Malay and could probably speak a little bazaar Malay and that the statements were recorded by the PW 3 Inspector Bob Arumugam, in English in a narrative form arising out of questions and answers in Malay. Further the actual language used in the recorded statements was not the actual language spoken by the daughters-in-law but only a narrative and probably condensed form;

(8) the emotional outbursts of the accused and his wife against PW 1 in particular and the police in general are quite genuine, not desperate theatrical acts as sometimes happen, such outbursts apparently appeared to emanate from grievance associated with the allegation of a case being framed up against the accused;

(9) the sending of the weighing scale (P 8) to the chemist after such a lapse of time from the sending of all the other exhibits was probably caused by the desire of the police to strengthen the case against the accused on account of the report lodged against PW 1 and the police by the accused's wife;

(10) every one in the family had free and unrestricted access to room B which was not locked;

(11) room B was not, at the time of the said raid occupied by the accused and was either not occupied by anyone in particular or by DW 2 as confessed by her, at the time of the raid; there was nothing in the room which could positively connect it to any particular inmate of the house as his or her regular room or bedroom;

(12) the exhibits are connected with trafficking in opium and the amount of such opium is far in excess of the personal needs of the accused as an addict;

(13) the raided house was loosely described by the accused as his house in his cautioned statement but it has belonged to his son at all material times and has never belonged to the accused at any time. He so described it as his house to an outsider or non-member of his family. When the accused spoke of his bed in his room where P 7, the wooden box with the cash was recovered, he could have probably so described the said room and the said bed in the room as his in the same loose, non-accurate way; and

(14) the cash in P 7, kept in the house was too large a sum for immediate daily family use. It was probably from the proceeds of sale of opium.

I now will set out briefly the principles of law applicable to the findings so as to reach a verdict.

Under section 37 (a) of the Act, any person who is found in possession of, for the purpose of our case here, 1,000 grammes or more of either prepared opium or raw opium shall be presumed to be trafficking in the said drug until the contrary is proved. Proof of possession is therefore indispensable as the groundwork for invoking this presumption.

In my view, unless the prosecution is aided by any appropriate statutory presumption in the Act, it has to prove possession by proving the three characteristics as stated in *Toh Ah Loh & Anor.* v. *Rex*[6], *viz.*, the possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing, and lastly must be conscious of his possession over the thing. Nothing short of proving these with or without the aid of any statutory presumptions will suffice.

For practical purposes in this case, only section 37 (d) of the Act which creates certain statutory presumptions against an accused is relevant, and it reads as follows:-

"Any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug, shall until the contrary is proved to have been in possession of such drug and shall until the contrary is proved, to have known the nature of the drug."

Whether the prosecution however can invoke the said section 37 (d) of the Act depends obviously on whether it can prove custody or control of room B in regard to the accused. In *Leow Nghee Lim* v. *Reg.*[7], the Court there then explained the meaning of custody as having care or guardianship of the goods on behalf of someone else with power of control over the goods. Control arises from custody, the reasoning cannot be faulted.

In view of my above-mentioned findings in general, and the findings in particular that the accused was not the occupier of room B; that the house had never belonged to the accused, and that everyone had free access to room B which was never locked and that the wife of the accused had control, management and care of all family matters, it would be a matter of grave doubt as to whether the accused had custody and control of the opium found in room B. The benefit of the doubt would have to be accorded to the accused on this score.

Assuming that I am wrong, and consequently the presumptions of possession and of knowledge of the nature of the said opium possessed have thus arisen against the accused, it still behoves the prosecution to prove that the accused had power of disposal over the opium. For possession to be criminal or to sustain a conviction, the prosecution must prove also that the accused had the power of disposal over the thing possessed, i.e. the said opium. This is the ratio of the case of *Toh Ah Loh (supra).* Taylor J. in *Leow Nghee Lim (supra)* at page 31, said, to quote:- "The main distinction between custody and possession is that a custodian has not the power of disposal. ..." Thomson, J., (as he then was), also said in *Chan Pean Leon* v. *Public Prosecutor*[8], "... there can be no possession without some power of disposal ...". Gunn Chit Tuan, J. in *Public Prosecutor* v. *Ang Boon Foo* [9] quoted with approval, the above passages and applied them.

I must not lose sight of the nature of the burden that is on the accused here to discharge the presumptions aforesaid, as being one of probability on a balance of probabilities, a burden higher apparently, in my view, than that in an ordinary criminal case of raising a reasonable doubt on the prosecution case. Please see *Public Prosecutor* v. *Yuvaraj*[10].

Applying the above principles, having regard to the findings set out above and which need not be repeated here, I am satisfied that the accused has established that it is more probable than not that some inmate in that house other than he that had the power of disposal over the said opium. It is desirable that investigation officers ought to pay particular attention to the question of power of disposal in gathering evidence so as to anticipate this line of defence without undue and complacent reliance on statutory presumptions giving rise to possession which is less than the possession as would sustain a conviction, *e.g.* see the wording of section 37 (d) of the Act, itself, which on a true construction, refers to mere physical possession when it mentions or uses the word, "possession" therein. Such mere physical possession, must further have all the three attributes as mentioned in that outstanding and signal case of *Toh Ah Loh, (supra),* so as to make it criminal.

The accused is therefore in the circumstances, acquitted and discharged.

Acquitted and discharged.

Solicitors : *Mahadevi Ganeshmurugan & Co.*